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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-139

J. D. KITCHENS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, J. D. Kitchens, respectfully requests that Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Mississippi entered in this case on 22nd day of April, 1974.

OPINION BELOW

The opinion is cited in 293 Southern Reporter 2d on pages 815-817 (Appendix A).

JURISDICTION

The Supreme Court of Mississippi entered judgment, February, 1974 (Appendix B), affirming the judgment of the Circuit Court of the Second Judicial District of Jones County, Mississippi (Appendix C), and denied his timely petition for rehearing, May 20, 1974 (Appendix D).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the Sixth Amendment as applied to the States, through the Fourteenth Amendment, require the State of Mississippi to grant one of its citizens accused of a serious crime a trial by jury?

2. Has petitioner been denied due process and equal protection under the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section II, Clause III of the United States Constitution:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACT

J. D. Kitchens, the Petitioner, was tried during the regular March, 1973, term of the Circuit Court of the Second Judicial District of Jones County, Mississippi, upon an information for constructive contempt in that the actions of the defendant were calculated to obstruct, impede, degrade, embarrass, defeat, and corrupt the administration of Justice (R. 5 & 6). The information charged that Petitioner contacted a prospective juror from the special venire drawn to try the case of his son, Jimmy D. Kitchens, for the crime of murder and styled State of Mississippi vs. Jimmy D. Kitchens, No. 4459, which was set for trial April 16, 1973, and that the Petitioner, J. D. Kitchens, "had contacted said juror Nowell with the full knowledge that Nowell was on such special venire, and informed said Nowell that Kitchens was the father of Jimmy D. Kitchens, the defendant in the aforesaid murder case, with the purpose and intent to influence the said juror Nowell's consideration in the event he was accepted as a juror in the case." (R. 5). Petitioner filed a demurrer which was overruled by the Court (R. 11 & 12). Petitioner was arraigned and pled not guilty (R. 13 & 19). Petitioner

orally pled to the information, admitting the allegations in paragraph 1 and denying the allegations in paragraphs 2 and 3 (R. 21). Petitioner then made a motion for a trial by jury which was overruled by the Court (R. 19-21).

The State's only witness was R. C. Nowell. Mr. Nowell testified that he was summoned on a special venire in the case of Mississippi vs. Jimmy D. Kitchens and that the Saturday before he was to appear for jury duty on the following Monday, J. D. Kitchens and his wife came to his house (R. 22, 23). Petitioner and his wife arrived at the Nowell residence sometime after dinner and stayed twenty to twenty-five minutes (R. 29). Although this was the first visit by either to the home of the other, they had grown up three or four miles apart and had known each other for many years (R. 29 & 31). They mostly discussed old times and acquaintances (R. 30). Mr. Nowell was in bed when the appellant arrived, heard the car horn, got up and went to the door. Petitioner got out and said that he wanted to see Mr. Nowell or talk to him or something of that nature. Mr. Nowell didn't remember the words used (R. 29). During the conversation Petitioner asked if Mr. Nowell had his summons, was told that he did and replied, "Well, my boy is up for trial" (R. 24). Nothing further was mentioned about jury service, the trial, or Petitioner's son (R. 24, 26). Petitioner didn't ask for any favors, nor for the witness to reach any certain result in the trial of his son's case (R. 24, 32, 37).

After Petitioner and his wife left, Nowell's oldest son, who lived nearby, came up and asked who the visitors were (R. 34, 78, 79). Upon being informed who the visitor was and the nature of the conversation, Nowell's son advised him to report the incident saying the Court would

get him if he didn't report it (R. 34, 78-79). Nowell didn't feel that he should report the incident until advised to do so by his son (R. 36).

Shortly after the Petitioner left, Nowell, at the urging of his son, called the District Attorney and asked to be excused off the jury (R. 33). The reasons given were that he got to studying about it and he didn't want to sit on the jury, because he has smothering spells, had to retire young, and because he was raised with the defendant's father (R. 33, 37).

Mr. Nowell testified that he lived on Highway 84 East and owned land and a house on that particular Saturday and paid taxes on the land at the Courthouse in Laurel, Mississippi (R. 39).

On cross-examination, the witness Nowell was questioned from the transcript of his testimony in response to questioning by the Court during the voir dire examination, out of the presence of the jury, at the trial of Jimmy D. Kitchens, which resulted in the constructive contempt proceedings against the Petitioner being initiated. The transcript of the testimony was introduced into the record (R. 61-73). The Court and District Attorney each asked the prospective jurors whether or not they had been talked to in relation to the case, and then the Court asked them specifically whether or not they had told anyone that they had been talked to and on each occasion Nowell failed to respond (R. 61, 62). Nowell responded only when specifically asked by name if he, Mr. Nowell, had talked to the District Attorney (R. 62).

Mr. Nowell told the Court that Petitioner and his wife came by his house. He did not recall Petitioner asking if he were a juror, but recalled having told Petitioner that he had a summons before anything was men-

tioned about the case. Petitioner only mentioned that his son was on trial or was to be tried or something like that (R. 63). He did not mention that the case was coming up for trial the coming week (R. 63). Petitioner did not ask Nowell to do anything in relation to the case, nor ask him to reach any particular decision in it (R. 63). Petitioner did not tell Nowell how the killing occurred nor did he tell anything about the guilt or innocence of his son (R. 64). Nowell did not think Petitioner was trying to influence him (R. 66). Nowell called the District Attorney, after Petitioner left, because he didn't want to be on the jury for the reason that he and Petitioner were raised together three or four miles apart (R. 63, 64). He was not wanting to be excused because he was talked to, but because he did not think it was right to sit on the jury having been raised with Mr. Kitchens (R. 64).

The defense produced two witnesses, Petitioner's wife and Petitioner.

The first witness was Mrs. J. D. Kitchens, wife of the Petitioner, who testified that she and her husband had been up to Beat Four School to visit their granddaughter (R. 81). She was not at home and around 12:30, they proceeded back to Laurel on Highway 84 and her husband wanted to stop by Mr. Nowell's, who was an old friend (R. 82). Petitioner retired from the State Highway Department on June 6, 1971 (R. 82 & 86). Mr. Nowell was alone and he and Petitioner talked about old times and nothing specifically, and nothing was said about their son until Mr. Nowell told them he was on jury duty. He asked about the boy and was told that the trial was coming up (R. 83). Nothing else was said about the matter. The witness did not know that Nowell was on the jury because she had not seen a jury list. The first time that she saw a jury list was when they left

Nowell's house and went by the jail (R. 84). They stayed about twenty minutes (R. 85).

The next witness was the Petitioner who testified that he and his wife went to Beat Four School to see their granddaughter but she was not there and on the way back to Laurel stopped by Mr. Nowell's, whom he had not seen in a long time (R. 86-87). Appellant had known Mr. Nowell for a long time and knew where he lived, because he had worked on Mr. Nowell's road off and on for four years during his service with the Mississippi State Highway Department (R. 88). Petitioner and Nowell talked about each other's family and when Nowell asked about Petitioner's son, Petitioner said that he had a trial coming up at which time Nowell informed him that he was on the jury. Nothing else was said. Petitioner and his wife left around 12:30 and went to the jail (R. 89). Petitioner did not know that Nowell was on the special venire prior to his visit. Petitioner had not seen a jury list prior to going to the jail to see his son after his visit with Nowell. He had not seen or communicated with his son since the previous Saturday nor had he seen any of his lawyers. Petitioner had not communicated with his son by phone or any other means as he did not have a home phone (R. 91)

ARGUMENT

The Lower Court Has Denied Petitioner Due Process As Afforded By The Process Clause Of The Fourteenth Amendment

In criminal contempt proceedings, the moving information must have the same specificity as an indictment. Petitioner quotes the information (R. 5, 6 & 7) as follows:

"IN THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

MARCH A.D., 1973 TERM

No. 9090

STATE OF MISSISSIPPI
Plaintiff

vs.

J. D. KITCHENS
Defendant

Information

The State of Mississippi, by William Harold Odom, District Attorney of the Eighteenth Circuit Court District of Mississippi, and Robert Sullivan, Prosecuting Attorney of Jones County, Mississippi, for cause of complaint would show unto the Court the following facts, to-wit:

I

That heretofore at this term of Circuit Court there was on the docket of this Court the case styled State of Mississippi vs. Jimmy D. Kitchens, #4459, set for trial April 16, 1973. That a Special Venire was lawfully drawn to serve in this case beginning Monday, April 16, 1973, and that R. C. Nowell was one of the Jurors drawn on said Special Venire.

II

That thereafter the aforesaid case was called for trial on said date, and said Special Venire, including said Nowell, were seated in the jury box, and during the course of the voir dire examination of said prospective jurors, it appeared that one J. D. Kitchens had contacted said Juror Nowell with the full knowl-

edge that Nowell was on such Special Venire, and informed said Nowell that Kitchens was the father of Jimmy D. Kitchens, the Defendant in the aforesaid murder case, with the purpose and intent to influence said Juror Nowell's consideration in the event he was accepted as a juror in the case.

III

That the aforesaid acts and conduct on the part of the Defendant, J. D. Kitchens, constitute constructive contempt and were calculated by the said Defendant to obstruct, impede, degrade, embarrass, defeat, and corrupt the administration of justice in this Court.

WHEREFORE, premises considered, your Petitioner, The State of Mississippi, by and through its duly qualified prosecuting authorities, pray that the Court shall enter a Fiat authorizing and directing the Clerk to issue a citation together with a true copy of this information to the said J. D. Kitchens, commanding him to be and appear before this Court for a hearing, at a time and place to be fixed by the Court, to show cause, if any he can, why he, the said J. D. Kitchens, should not be adjudged guilty of constructive contempt of this Court because of the alleged commission of the acts and conduct described in this Petition, and to further show cause, if any he can, why he, the said J. D. Kitchens, should not be punished for constructive contempt of this Court, according to law.

Respectfully submitted,

The State of Mississippi
By: /s/ Wm. H. Odom
District Attorney
and
/s/ Robert Sullivan
County Prosecuting Attorney

STATE OF MISSISSIPPI

COUNTY OF JONES

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, WILLIAM HAROLD ODOM, DISTRICT ATTORNEY of the Eighteenth Circuit Court District of Mississippi, and ROBERT SULLIVAN, COUNTY PROSECUTING ATTORNEY of Jones County, Mississippi, who each being by me first duly sworn state on their oaths that they have been informed and believe on such information that the allegations contained in the foregoing Information are true and correct as therein stated.

/s/ Wm. H. Odom
District Attorney

/s/ Robert Sullivan
County Prosecuting Attorney

SWORN to and subscribed *before* me this April 16th, 1973.

Donice V. Knight
Circuit Clerk, Jones Co., Miss.

By: /s/ Marguerite Mullican, D. C.

FILED APRIL 16, 1973
DONICE V. KNIGHT, CIRCUIT CLERK
JONES COUNTY, MISSISSIPPI
MM"

To this information petitioner filed a demurrer as follows: (R. 11)

"IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

No. 9090

STATE OF MISSISSIPPI
Petitioner

vs.

J. D. KITCHENS
Defendant

Demurrer

J. D. Kitchens, the defendant, filed this his Demurrer to the information heretofore filed against him in the above styled and numbered cause, and for cause of Demurrer would show:

I

The allegations contained in said information, if taken as true, does not state a crime recognizable or punishable under the laws of the State of Mississippi.

Respectfully Submitted,

/s/ Travis Buckley
Travis Buckley, Attorney for the Defendant

CERTIFICATE

I, Travis Buckley, attorney for the defendant, J. D. Kitchens, hereby certify that I believe that the above and foregoing Demurrer ought to be sustained.

Certified by me on this the 20th day of April, 1973.

/s/ Travis Buckley

FILED APRIL 24, 1973
DONICE V. KNIGHT, CIRCUIT CLERK
JONES COUNTY, MISSISSIPPI"

After the demurrer was overruled, Petitioner moved for a trial by jury (R. 19 & 20) which was overruled.

The information does not charge affirmatively that Petitioner committed any act whatsoever. Paragraph 11 of the information attempts to set forth the offensive conduct of the Petitioner. However, it will be noted that the words of the scrivener are speculative and drawn from suspicion and conjecture and leaves the Petitioner in the position of being charged with what the scrivener from the voir dire examination surmised and not with what he, in fact, had done.

Petitioner has not found any Mississippi cases that set forth in detail the requirements of an information in a case such as this. However, it is apparent that under the State's theory of this case it was necessary to the jurisdiction of the trial Court that a valid information be filed before any proceedings could be had against the Petitioner. *Durham* v. *Durham*, 97 Miss. 549, 52 So. 627; *Jordan* v. *State*, 216 Miss. 542, 62 So. 2d 886. The information in the case at bar is so vague and indefinite that it deprives Petitioner due process under the Fourteenth Amendment.

The Supreme Court of Mississippi held the information in the case of *Prine* v. *State*, 143 Miss. at page 238 to be sufficient in the following particulars, to-wit:

> "The said T. M. Prine, Joe Prine, and Osro Prine, with full knowledge of the fact that the said Sampson Holloway had been subpoenaed as a witness in the cause aforesaid, and with full knowledge of the fact that said witness was then on his way to attend said Court as a witness, and then and there did attempt to prevent the said Sampson Holloway from attending said court in response to said process by then and there saying to the said Sampson Holloway, 'There

is the God damned son of a bitch now.' And by then and there further saying, 'Let me cut the God damned son of a bitch's throat,' 'I'll kill the God damned son of a bitch;' 'You had better not go up there swearing your God damned lies;' 'I dare you to go up there to court and tell them damned lies,' or words of like report and meaning and equivalent thereto, and by then and there taking hold of a rail, and exhibiting the same in the presence of the said Sampson Holloway, all of which was then and there with the purpose and intention of preventing the said Sampson Holloway from obeying the process of his honorable court, and that all of the said conduct and demeanor on the part of the said T. M. Prine, Joe Prine, and Osro Prine constituted, and was and is, an expression of contempt for this honorable court, and that the said T. M. Prine, Joe Prine, and Osro Prine should each and all be cited to appear before this honorable court and show cause, if such they can, why they should not be judged guilty of contempt of court and punished for the same."

Also, in *Perrow* v. *State of Mississippi*, 67 Miss. at page 366 the charge was as follows:

"that J. J. Goss was indicted for murder by the grand jury at the April term, 1889, sitting in and for said county of Pike, and that one S. F. Perrow was a material witness on behalf of defendant, J. J. Goss, and that said S. F. Perrow was duly summoned to appear before the Hon. circuit court of Pike county at its April term, 1889, on the 20th day of April, 1889, and to appear from day to day and from term to term of said court until discharged by law; and so the grand jurors upon their oaths do further present that S. R. Perrow, late of the said county, on the

24th day of April, 1889, in the county aforesaid, unlawfully and wilfully did then and there attempt to obstruct and impede the trial of said cause, to wit, the *State of Mississippi* v. *J. J. Goss* charged with murder, by then and there counselling, advising and secreting said witness, S. F. Perrow, to remain away from and absent himself as a witness on behalf of said J. J. Goss, when said case was called for trial in aforesaid court, and by virtue of said counselling and advising to the said S. F. Perrow, given by the said S. R. Perrow, said S. F. Perrow failed to answer as a witness as aforesaid, when said cause was duly called in court, against the peace and dignity of the State of Mississippi."

See *Gaston* v. *State,* 123 So. 2d 564, 239 Miss. 420 where it was held:

> "Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to an attempt to intimidate or impede him within statute rendering such an attempt criminal. Sec. 2294, Code 1942." [Sec. 97-9-55 Code 1972]

No Crime Was Committed

In support hereof we attach the testimony of Mr. Nowell, the only witness introduced on behalf of the State (R. 7) (Appendix E).

There was no reason or justification to order the District Attorney to institute contempt proceedings and in support hereof we make that part of the trial record (R. 63-70) (Appendix F) a part hereof.

Under this point of argument it is respectfully submitted with the utmost of deference to the trial Court

the petitioner was convicted on mere suspicion and conjecture.

The Supreme Court of Mississippi, in the first paragraph of the trial judge's opinion adopted by the lower Court said:

> ". . . The Court can find no other basis for a visit other than for the purpose of influencing a juror in this case."

Nothing in the testimony reflects any attempt whatsoever to influence the juror Nowell. On the contrary, the witness Nowell repeatedly emphasized that he did not believe that the appellant was seeking any favors or trying to influence him in any way. The exact statements of the witness in each instance were:

> A. Well, he didn't—the only thing he said to me, and he didn't ask me no favors whatsoever, he asked me did I have a summons, or something like that, and I told him yeah.
> Q. You hold him you were on the jury?
> A. Yeah. I told him I had a summons, or whatever, and he said, "Well, my boy is up for trial." I don't believe he stated what for or nothing like that, but I had read it in the paper and that's all I know. And that's about all. He didn't ask me for no favors whatsoever.
> (R. 24)
> A. But he didn't ask me for no favors whatsoever.
> (R. 37)
> Q. What did—did he ask you to do anything in relation to it?
> A. No, sir.
> Q. To reach no particular decision in it?
> A. No, sir.
> (R. 63)

Q. Did he tell you how the killing occurred?
A. No, sir.
Q. Did he tell you anything about the guilt or innocence of his son?
A. No, sir.
(R. 64)
Q. Do you think he was trying to influence you in this case?
A. No, sir, I don't.
(R. 66)
Q. And did you know Mr. Nowell was on the jury when you went to his house?
A. No, sir.
(R. 95)

It is apparent that the witness Nowell was not telling the truth or that the trial judge reached an erroneous conclusion, whether supported by the evidence or not. If the witness Nowell was such an unconvincing liar that the trial judge could not believe him in that regard then he certainly should not have regarded any of his other testimony as being believable but, as will be hereinafter noted, he found Nowell to be a person "who is trustworthy and honest".

There is another reason why the above quoted portions of the opinion of the trial judge are clearly erroneous. It is plain from the testimony of the appellant that he had stopped by to see Nowell on returning from the home of his granddaughter. Mr. Kitchens and his wife had gone to see their granddaughter, and finding no one at home had begun the return trip home and had stopped to see Nowell on the return trip (R. 87). Mr. Kitchens had retired from the State Highway Department a few months prior to the trial and he had not seen Mr. Nowell in about four years (R. 88). Prior to his retirement and

during the time when he was working in the area of Mr. Nowell's home he would see Mr. Nowell frequently (R. 88). It is much easier and logical to conclude from the testimony that when the appellant went to see his granddaughter and found that she was not at home he realized that he had some spare time and would avail himself of the opportunity to visit the only person he knew in the neighborhood. It is only fair to assume that Mr. Kitchens had not had opportunity to visit his friend when regularly employed but now that he was retired he had little to do except visit friends and relatives. Regardless of what inference is most logical under the circumstances, that inference must yield to proven facts and the purpose for appellant's visit is clear from the testimony.

The same paragraph, in the next sentence, contains the following statement:

> "The testimony is somewhat hazy concerning whether or not the defendant knew at the time he visited the prospective juror whether he knew Nowell was at that time, or had at that time, already been summoned. The Court finds that he did know."

It is elementary principle of law that all persons charged with criminal offenses are presumed innocent and that if there is, at the conclusion of the taking of all of the evidence, any material point that the prosecution has failed to prove to the satisfaction of the trier of fact, beyond a reasonable doubt, then the trier of fact is under an obligation to resolve that doubt in favor of the accused. In saying that the testimony was "hazy" the Court necessarily, under the facts of this case, conceded that there was a reasonable doubt on that point. It cannot be reasonably argued that the question of whether or not the appellant knew that Nowell had been summoned prior to the

visit is material. The trial court thought it was. A cursory examination of the testimony of both sides will clearly reveal that such conclusion was not supported by the evidence or any permissible inference to be drawn from the evidence.

Some examples of testimony supporting the position of the Petitioner are:

THE WITNESS NOWELL

A. ". . . he asked me did I have a summons, or something like that, and I told him yeah.

Q. . . . but he asked you if you were served for the jury and would be on the jury, didn't he?

A. Yeah."

(R. 24)

Q. "What was your response again? Would you state it louder, Mr. Nowell, sir. You said you don't believe he mentioned a summons to you?

A. Yeah, he asked me did I have a summons, and I told him yeah."

* * *

Q. "Yes, sir. The Court asked you did Mr. Kitchens ask you whether or not you were a juror and you said, 'I don't think so.'

A. He asked me did I have a summons."

(R. 56)

Q. "Did you understand what the Court was asking you when he asked you did Mr. Kitchens ask you if you were a juror?

A. He asked me did I have a summons."

(R. 57)

Q. "He just asked if you had a summons?

A. Right."

(R. 58)

Q. "Did he ask you if you were a juror?
A. I don't think so.
Q. Did you tell him you were a juror?
A. I told him I had a summons."
(R. 64)

THE APPELLANT

Q. "What was the conversation that day, Mr. Kitchens?
A. We just talked and he told me about his son-in-law passing away and he—I asked him how everybody was and he asked me about my son and how he was, and I told him he had a case coming up in Court, and he says, 'Well, I am on the jury.' And there wasn't another word said about it in no way.
Q. Did you ask him if he had a summons, or . . .
A. . . . No, sir, I did not."
(R. 88)
Q. "Did you know Mr. Nowell was on the jury when you went to his house?
A. No, sir."
(R. 95)

MRS. KITCHENS

Q. "Did you know Mr. Nowell was on the jury when you went there?
A. No, I did not. I had not seen a jury list at that time."
(R. 84)

From the above excerpts from the record it is patent that the appellant did not know that Nowell had been summoned as a juror when the visit occurred. The only thing that could possibly be "hazy" about the transaction is whether or not the appellant knew that the witness Nowell was to be summoned or not. Nowell even testified

at the preliminary hearing that he and not Kitchens was the first to mention the summons. At any rate, taking the testimony of the State's only witness, conflicting and confusing as it is, in a light most favorable to the State, it is apparent that the appellant did not know that Nowell had been summoned as a juror. If he had been possessed of such knowledge why would he have asked Nowell whether or not he had a summons? If Nowell is not to be believed about that portion of his testimony then there is no alternative but to accept the testimony of Mr. and Mrs. Kitchens to the effect that they had no knowledge of Nowell being summoned and that they cut off all conversation relative thereto when they learned that he had been summoned.

The trial testimony of the witness Nowell conflicted materially with his testimony taken at the preliminary hearing (Appendix F). It is important also to note that at the preliminary hearing the Court did not regard it as an adversary proceeding but conducted the interrogation of the witness himself (R. 62, et seq.) (Appendix F). Most of the questions asked the witness were asked in a manner designed to reach the crux of the matter in issue and the answers tended strongly to exonerate the petitioner (R. 66). However, when he took the witness stand the State was allowed, over objection by the defendant, to ask leading questions that suggested answers which tended to support the prosecution's case (R. 22-39). Those answers were materially in conflict with the testimony taken at the preliminary hearing in the following particulars.

1. How long it had been since the parties had seen each other.

2. As to who first mentioned the jury duty.

Possibly those discrepancies were the things that led the trial court to conclude that Nowell was a reluctant wit-

ness. However, the trial testimony of Nowell adequately reflects that the witness followed the lead provided by the district attorney over objection by the defendant. Rather than being a reluctant witness it would appear that he was more like a tape recording prepared by the prosecution at another time and played in open court for the court. This writer has been a prosecuting attorney and is well aware of the problem that frequently confronts a district attorney when a tenuous case hangs by a thin thread of testimony within the exclusive knowledge of a reluctant witness. However, I am also aware of the fact that prosecutors in their zeal to effectively perform the duties that they feel devolve upon them by statute sometimes lose sight of the fact they have a corresponding obligation to protect the right of all people to a fair trial and that the result is that in building a case with one witness will be ". . . tactful and or subtle or . . . skillfully and diplomatically engage in euphemistic camouflage of purpose . . ." in framing the testimony of the witness so that it will agree with the State's theory of the case. Is it equally as likely that the witness was reluctant to testify because he feared that open and candid testimony would bring reproach upon him even as it had the petitioner? Is it not equally as logical to conclude that the testimony of the witness at the preliminary hearing, a short time after the occurence of the events in question and before his mind and poor memory were beclouded by interviews and possibly suggestive interrogations from the district attorney, was more accurate than that given at the trial? Is it not more logical to assume that if the witness was reluctant to testify that the district attorney or court—he was interrogated by both—would have asked him whether or not he was reluctant to testify and the reason for such reluctance? Nowell was in the courtroom when the Court ordered the petitioner cited for contempt. Possibly the witness thought he was

under an obligation to support the position of the trial judge. "A person personally known to him."

The above quoted passage from the opinion of the Court is a classic example of the wisdom of the United States Supreme Court in ruling that such decisions should not be left to the judge before whom the contempt is alleged to have been committed and the rule of this Court that this Court will act as the trier of fact as well as the law when the conviction for contempt is appealed.

It may be argued that the petitioner should have moved for the judge to recuse himself from the trial of this case as suggested by the practice outlined by the United States Supreme Court in several cases, one of which was appealed from this Court. However, the petitioner did not know that the trial judge and the witness Nowell knew each other or that the trial judge held Nowell in such high regard. The laws of this State do not afford the accused an opportunity to interrogate the trial judge relative to his feelings nor does it afford the accused a method of peremptorily challenging the judge's authority to try the case. The petitioner would have had to show that the trial judge had an interest in the outcome of the case or that he probably could not be fair and impartial for some assigned reason. Surely justice and fair play, as contemplated by our laws and the laws and Constitution of the United States, dictate that guilt or inncence of an accused should not be dependent upon and decided by a trial court judicially noticing matters which are fairly in dispute. It would be frivolous to argue that the state could have proven that the witness Nowell was honorable, honest or trustworthy, without the issue being raised by the defense, and even then, after a proper predicate had been laid, his reputation would have been all that was in issue. Such relationship between the trial judge, who

also acts as the trier of the fact, and the only prosecution witness is too heavy a burden for any defendant to bear and is a burden not contemplated or imposed under our system of due process and fair trials. No lawyer would be a credit to his profession if he would have accepted any juror who held such preconceived notions about the only witness for the State.

Further, the trial Court said:

> "The effect of that visit is visibly seen in what transpired immediately following the termination of the visit. This prospective juror being prodded by his conscience called the district attorney and related to him that he had been approached and requested the district attorney to excuse him from the case."

Again, in the second full paragraph in page four of this Court's opinion the trial Court said:

> ". . . R. C. Nowell felt constrained to report to the district attorney that he had been contacted . . ."

Again those findings of the trial Court do not find support in the record.

The simple truth of the matter is spelled out clearly, with no room for interpretation or inference. The witness reported the incident because someone told him that he should and would get in trouble if he didn't (R. 34, 36, 78, 79). He did not personally feel that he was under any obligation to report the incident but was simply following the suggestions of another (R. 36). The witness did say that he did not want to serve on the jury because of his bad health (R. 33), and because he was raised with the petitioner (R. 37). Nowhere in any of the testimony is there any indication that the witness was "prodded by his conscience" as represented by the trial Court. It is

apparent that he was prodded by his desire to get out of jury duty and to comply with the request of his son.

Also, in the last full paragraph on page four of the opinion of this Court the trial Court said:

> ". . . The result of it (the visit) is that the trial of one who is charge (sic) with one of the most serious crimes known to this nation has been delayed."

It is necessary to a full understanding of that statement to look only to the testimony and statements taken at the preliminary hearing and appearing in the trial transcript beginning at page 61. The Court's opening statement clearly shows that the voir dire examination of the jury was being conducted when it was brought out that the witness Nowell had been visited by the petitioner (R. 61).

It is also clear from the record that this was well after the completion of the preliminary qualification of the jury by the Court (R. 61-62). It is also abundantly clear from the record that both the district attorney and trial judge were aware of the visit and had discussed it long before the convening of the Court on the morning that the voir dire examination resulted in the special venire being quashed (R. 68). There is absolutely nothing whatsoever to indicate that the defendant for whom the special venire had been drawn, or his lawyer, were aware of the visit. It is manifest that it cannot be logically argued that any conduct of the petitioner resulted in the quashing of the venire or the abortion of the trial. If the trial judge and district attorney were aware of the visit and believed that it was for the purpose of influencing the jury the proper and correct course of action was apparent. The prospective juror should have been preliminarily examined out of the presence of the remainder of the special and regular venire.

No reasonable person could, without doing harm to his reputation for veracity, argue that the trial judge and district attorney, two persons with many years of trial experience, were not aware of the fact that that is the proper approach under such circumstances. Likewise, both the district attorney and the trial judge well knew that the examination of Nowell and his answers to that examination, relative to the visit by the petitioner, were well calculated to cause the remainder of the venire to have a preconceived opinion of the case against the man about to be tried. Why else would the Court have sustained the motion to quash the venire, a motion joined in by the district attorney (R. 72)? There would not have been any prejudice to the accused and thus no basis for quashing the venire if the trial court and district attorney had followed the tried, proven and commonly employed method of questioning the veniremen out of the hearing of the other persons summoned to serve. Thus it is readily apparent that the inexplicable actions of the district attorney and trial judge were the direct and proximate cause of the venire being quashed.

In the next to last paragraph of the trial Court's opinion the Court said:

> "Any willful attempt, of whatever nature, intended to influence jurors improperly in the impartial discharge of their duties, whether by conversation or discussions, is contemptuous, and it is wholly unnecessary that such attempt to influence the jurors should have succeeded. Here they did."

The statement to the effect that the petitioner's actions influenced the juror Nowell in the impartial discharge of his duties is simply not supported by the record. The record does reflect, as heretofore noted, that the witness reported the incident because someone else told him to.

The petitioner has pointed out the particulars wherein the opinion of the trial Court, adopted by this Court, is in conflict with or not supported by the trial transcript. We firmly believe that the trial judge is a person of unquestionable ability and integrity and was, in rendering the decision adopted by this Court, motivated more by his natural aversion to juror tampering and his friendship with, and regard for R. C. Nowell, than he was by traditional considerations of fair play and due process. Of course, we cannot say and do not attempt to say that we know of any hatred, contempt or ill will that the trial judge held for the petitioner but we do say that the petitioner did not get a fair trial at the hands of that Court and that the verdict of the trial Court was based upon findings of fact that came from some place other than the record. It would be futile and absurd to assert that the conclusions of the trial judge were fair inferences to be drawn from all of the testimony because so many of the findings were so completely outside of the record. If the Court could legitimately draw the inferences that he did from the testimony in this case, then the law could be easily construed to prohibit anyone from visiting a person summoned for jury duty regardless of whether or not the visitor had any knowledge of the summons and regardless of the purpose of the visit.

The petitioner is also firmly convinced that the upholding of the conviction of the petitioner in this case gives additional meaning to the findings of the United States Supreme Court in *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499, in holding that in many contempt cases the trial judge must recuse himself. However, the petitioner is not convinced that such was the proper course of action in the instant case because this case differs materially from the United States Supreme Court decisions holding that the judge before whom the offensive conduct is charged to have been committed must

recuse himself, in that in the case at bar no offensive conduct was directed at the person of the judge and he was not, to the knowledge of the petitioner, personally involved nor was his reputation or the reputation of his Court in question. The petitioner relied, as he believed he was entitled to, on the decisions of this Court to the effect that this Court will, on appeal of a conviction for contempt, act as the trier of both the law and the fact. §11-51-9 Miss. Code of 1972, Recompiled. *Ballew* v. *Case*, 232 Miss. 183, 98 So. 2d 451, *Johnson* v. *State*, 233 So. 2d 116, *Evers* v. *State*, 241 Miss. 560, 131 So. 2d 653, *Brannon* v. *State*, 202 Miss. 571, 29 So. 2d 916. The petitioner feels that he is entitled to rely on the former decision of this Court holding that this Court would try the facts on appeal rather than to simply adopt the unsupported conclusions of the trial judge, and that to deny him such right is a denial of due process.

Petitioner's Rights Have Been Denied Under The Equal Protection Clause Of The Fourteenth Amendment

Petitioner was charged with a serious offense. §97-9-55, Mississippi Code, 1972, reads as follows:

> "If any person or persons by threats, force or abuse, attempt to intimidate or otherwise influence a judge, justice of the peace, juror, or one whose name has been drawn for jury service, witness, prosecuting or defense attorney or any other officer in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties, or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment not less than one (1) month in the county jail nor more than two (2) years in the state penitentiary or by a fine not exceeding five hundred dollars ($500.00), or both such fine and imprisonment."

In construing a statute to determine if it constitutes a misdemeanor or felony the Supreme Court of Mississippi cited in *State* v. *Sansome*, 97 So. 753, 133 Miss. 428, and *Ellis* v. *State*, 33 So. 2d 837, 203 Miss. 330 (1948), where the court said, "In testing an offense as to whether it is a felony or misdemeanor, the power given to imprison in the penitentiary determines it to be a felony. . . ."

Article III, Section II, Clause III, of the Federal Constitution specifies that in the trial of all crimes, except in cases of impeachment, the accused shall enjoy the right to a speedy and public trial by an impartial jury. Article 3, Section 26 of the Mississippi Constitution specifies that:

> "In all criminal prosecutions the accused shall have a right . . . in all prosecutions by indictment or information, to a speedy and public trial by an impartial jury of the county where the offense was committed."

The Mississippi Court has held that Section 26 of the Mississippi Constitution applies to trials for misdemeanors as well as felonies, *Corbin* v. *State*, 99 Miss. 486, 55 So. 43, *Jones* v. *State*, 204 Miss. 284, 37 So. 2d 311.

In *Duncan* v. *Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 144 (1968), the Court held that the Sixth Amendment as applied to the states, through the Fourteenth Amendment, requires the state court to grant the defendants accused of serious crimes a trial by jury.

In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477, the Court held that:

> "Serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the case, now binding on the State, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial. . . ." (Page 526).

This writer is aware that under the present cases, the Supreme Court of the United States had generally held that crimes punishable by a maximum of six months in jail are petty and do not require a jury trial. *Baldwin* v. *New York*, 399 U.S. 66, 26 L. Ed. 2d 437, 90 S. Ct. 1886 (1970). This writer is also aware that Mississippi permits contempt of Court cases to be tried without a jury and that the United States Supreme Court cases permit Federal contempt of Court cases to be tried without a jury within the framework of its distinction between petty and serious offenses. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 16 L. Ed. 2d 629, 86 S. Ct. 1523 (1966).

In his separate concurring opinion in *Bloom* v. *Illinois*, supra, Mr. Justice Fortas agreed:

> "that the Due Process Clause of the Fourteenth Amendment requires that the States accord the right to jury trial in prosecutions for offenses that are not petty. A powerful reason for reaching this conclusion is that the Sixth Amendment to the Constitution guarantees the right to jury trial in federal prosecutions for such offenses."
>
> "But although I agree with the decision of the Court, I cannot agree with the implication, see ante, 20 L Ed 2d at 501, m. 30, that the tail must go with the hide; that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts."
>
> "The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbi-

trarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith," (Page 536).

Petitioner does not quarrel with the holding of *Bloom* v. *Illinois*, supra, or *Baldwin* v. *New York*, supra, in that in the absence of other criteria, the line between a serious and a petty offense for the purposes of trial by jury is six months imprisonment, insofar as the Fourteenth and Sixth Amendments are to be applied to the individual state in order to bring about some degree of uniformity, given the various administrative and procedural differences within the State, within the context that these cases were decided. Petitioner would point out that in both *Duncan* v. *Louisiana*, supra, and *Baldwin* v. *New York*, supra, this Court was dealing with states which excluded the almost uniform "existing laws and practices in the nation." In the case at bar we are dealing with a state whose existing laws grant more protection, as far as a jury trial is concerned, than the apparent norm.

Nor does petitioner quarrel with the concurring opinion of Mr. Justice Fortas in *Bloom* v. *Illinois*, supra, or the dissenting opinion of Mr. Chief Justice Burger in *Baldwin* v. *New York*, supra, as these opinions are understood by this writer. In fact, petitioner's contention is that there are various State procedures and practices in which due

process should, except in extreme cases, be worked out within the framework of the separate procedures.

In the American Bar Association project on Standards for Criminal Trial, Trial By Jury 20-23, a survey found that not all state constitutions provided for a jury trial in all criminal cases, and of the slightly over two-thirds of the state constitutions which did so provide, most of these states by interpretation did not extend a jury trial for petty offenses. Some states provided no jury trial for petty offenses at all while others did not provide a jury trial at the first stage.

Approximately half of the states provide for a defendant convicted in a justice of the peace court or other lesser tribunal to obtain a trial de novo upon appeal to a circuit or superior court. According to this survey:

> "It is not uncommon, under such systems, for jury trial to be unavailable in the lower court but available on the trial de novo." (Page 23)

Mississippi falls within this category. §99-35-1 Miss. Code 1972 annotated provides:

> "In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice of the peace, or by the mayor or police justice of a city, town or village, for the violation of an ordinance thereof, an appeal may be taken within forty (40) days from the date of such judgment of conviction to the circuit court of the county which shall stay the judgment appealed from."
>
> "On appearance of the appellant in the circuit court the case shall be tried anew and disposed of as other cases pending therein."

§99-33-9 Miss. Code 1972 annotated provides:

> "A defendant in a criminal case before a justice of the peace may, in like manner as in civil cases, demand a jury, and thereupon the justice shall proceed as in other cases."

In Mississippi, a defendant is entitled to a six-man jury trial in justice of the peace court, and, if convicted, to a twelve-man jury trial in the circuit court upon appeal of a sentence which imposes only a nominal fine with no imprisonment. §11-9-143 Miss. Code 1972 annotated, *Markham* v. *State*, 209 Miss. 135, 46 So. 88; *Wolf* v. *Martin*, 1 How. 30; *Byrd* v. *State*, 1 How. 163; *Little* v. *Wilson*, 189 Miss. 325, 199 So. 72. Indeed the only criminal offense in which a defendant is not entitled to a jury trial in Mississippi is the crime of contempt of court.

Setting aside the various forms of direct contempt in the presence of the court, or civil contempts or those in which a defendant can purge himself and thereby avoid punishment, and dealing with criminal contempts such as in the case at bar, it would seem that Mississippi and a few other states are perhaps in the unique position of granting a jury trial in a "petty" offense such as a parking ticket violation, while denying a jury trial in criminal contempt cases where the sentence can be six month imprisonment and a $500.00 fine.

In this case the inequity is further compounded because the information in the instant case tracked the statute of §97-9-55, Miss. Code 1972 annotated, which is a felony and carries a term of 2 years.

The *Bloom* v. *Illinois*, supra, case holds that serious criminal contempts are to be treated as other serious crimes and while a six month sentence is considered petty for the purpose of the Federal Courts imposing an upper

limit upon the various states, some of which exceeded that limit, within the context of Mississippi's criminal procedure, a six months sentence without a jury is indeed "serious."

Even if it is argued that petitioner was not tried under the felony statute, but was tried for contempt, the crime for which he was tried is surely more malum in se, serious and infamous than jay walking, public drunkenness, running a stop sign, speeding, vagrancy, etc., all of which permit a trial by jury in Mississippi.

A recent New York case held that a person charged in the City of New York with a misdemeanor which entitled him to a jury trial could not be denied that jury trial by the tactic of the prosecuting attorney's reducing the charge to a lesser included offense which did not entitle him to a jury trial. *People* v. *Howlett*, 351 N.Y.S. 2d 289 (Dec. 17, 1973).

While not completely analogous, petitioner contends that he has been denied his rights under the Fourteenth Amendment, not as applied to the Sixth Amendment to the Federal Constitution, but as it is applied to the state's constitutional jury provision and attendant body of statutes and case law, whereby a judge and prosecuting attorney have within their power to deny a defendant a jury trial in contravention of the State and Federal Constitution by arbitrarily deciding which person accused of the same acts is to be indicted under the felony statute and afforded a jury trial and which person accused of the same conduct is to be denied a jury trial by proceeding under an information of criminal contempt.

Reason and logic dictate that the cases such as *Bloom* v. *Illinois*, supra, and *Baldwin* v. *New York*, supra, set perhaps the exact demarcation line between petty and serious misdemeanors in Federal cases but set only upper limits inso-

far as the various states are concerned. For instance, no one would argue that the legislature of Mississippi or any other state could not now or later increase the penalty for petty crimes upward to six months imprisonment without granting a jury trial or that the appellate courts of the various states, in the absence of clear legislation and case history could not likewise increase from a lesser penalty to the greater penalty now allowed by U. S. Supreme Court.

The converse is not true, that the states, through their courts and legislatures cannot exceed the limits set by this Court.

In the alternative, this writer does not believe that this Court has held that a state, which by its constitution, statutes and case law, requires a jury trial for "petty crimes" within this Court's definition, by appellate court interpretation contrary to past case history, and not by constitutional amendment or statutory revision.

It is petitioner's contention that Mississippi makes no distinction as to petty or serious crimes and therefore Mississippi and other states, if any, with similar laws and procedures are held to a higher degree of providing a jury trial in a criminal contempt trial than are other states, which do distinguish between petty and serious crimes. Or, in other words, the states should be held to the same degree in criminal contempts as those states afford a jury trial in noncontempt trials.

The next ground for which petitioner claims he should have been entitled to a jury is that the nature of the offense for which he is charged is so serious that a jury trial is required, regardless of the punishment imposed. *Callan* v. *Wilson*, (1888) 127 U.S. 540, 32 L. Ed. 223, 8 S. Ct. 1301; *District of Columbia* v. *Colts*, (1930) 282 U.S. 63, 75 L. Ed. 177, 51 S. Ct. 52. Petitioner was charged with having:

". . . contacted said Juror Nowell with the full knowledge that Nowell was on such Special Venire, and informed said Nowell that Kitchens was the father of Jimmy D. Kitchens, the Defendant in the aforesaid murder case, with the purpose and *intent to influence said Juror Nowell's considerations in the event he was accepted as a juror in this case.*

III

That the aforesaid acts and conduct on the part of the Defendant, J. D. Kitchens, constitute constructive contempt and were calculated by the said Defendant to *obstruct, impede, degrade, embarass, defeat, and corrupt the administration of justice in this Court.*" (emphasis added).

In light of current events now developing in the nation's capitol and events that have developed in the past several years, it is difficult to understand how anyone could maintain that obstruction of justice is a petty offense in nature regardless of the punishment imposed. Concededly, the alleged offenses of petitioner, whether actual or not, will not cause a constitutional crisis, whether punished or not, to the degree as will the alleged obstruction of justice of those in high positions, and the principles are the same. In fact, it is indeed hard to imagine a more serious offense than jury tampering, or the attempt thereof, and the obstruction of justice in a land whose government, law and courts are as committed to the jury system as is ours. Indeed, the legislature of Mississippi has expressed its opinion of the offenses of which petitioner is charged, by making those offenses a felony and by providing for a penalty of up to two years imprisonment in the state penitentiary.

In conclusion on the point of the jury trial for a criminal constructive contempt, petitioner is not arguing that the Court's rulings on the distinction between serious and petty crimes should be overruled, but that within the framework of this ruling, the law should be extended to reflect the laws of the various states and that some degree of finality could be reached by so ruling. For instance, a state which exceeds or comes within the limits of six months and $500.00 for a nonjury trial is obviously well settled. In a state which limits a nonjury trial to a crime in which the maximum penalty is three months, then the maximum penalty for criminal constructive contempts without a jury should be three months, etc. In a state in which a jury trial is provided for the pettiest offenses, either initially or on appeal de novo, then those states should provide for jury for all criminal constructive contempts. It is equally obvious that the legislatives could in these instances, limit the right to a jury trial in petty crimes and thus protect the "inheritant rights" of the courts to try contempts without a jury, if they so desired.

It could hardly be argued that in a state which grants a jury trial for all crimes, that expense, time or a crowded court docket would compel a nonjury for contempts of court. In words of this Court in *Bloom* v. *Illinois,* supra:

> "Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the

arbitrary exercise of officer power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of the judge's temperment. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Court to the Supreme Court of Mississippi.

Respectfully submitted,

L. PERCY QUINN
P. O. Box 1085
Laurel, Mississippi 39440
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, L. Percy Quinn, Counsel for the Petitioner, hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi with attached appendices have been mailed, postage prepaid, to Hon. A. F. Summer, Attorney General of the State of Mississippi, of Counsel for Respondent at his regular Post Office Address, Jackson, Mississippi.

This the 16th day of August, 1974.

L. PERCY QUINN

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 47,869

J. D. KITCHENS

v.

STATE OF MISSISSIPPI

SMITH, JUSTICE:

J. D. Kitchens was charged in the Circuit Court of Jones County with constructive contempt of that court. Following trial, he was adjudged guilty of that offense and sentenced to serve a term of six months in the county jail. He appeals from that judgment and sentence.

A number of matters are assigned as having constituted reversible error.

First, it is argued that the jurisdiction of the trial court to try the case was not established. This contention is without merit. In *Prine* v. *State*, 143 Miss. 231, 242, 108 So. 716, 719 (1926), it was stated:

> No other court [except the court against which the contempt was committed] has any authority to punish such a contempt. Statutes regulating the venue of trials of criminal offenses generally are inapplicable to contempt proceedings.

At page 126, 17 C.J.S. *Contempt*, section 51 (1963), the rule is given as follows:

> It is a well established rule that the power to judge a contempt rests exclusively with the court contemned, and that no court is authorized to punish a contempt against another court.

To the same effect, *see also* 17 C.J.S. *Contempt*, section 64, page 167 (1963).

We have examined and considered the other alleged errors assigned and have concluded from the record that appellant was fairly tried and that the evidence was sufficient to support the trial judge's findings.

The contention that appellant was entitled to trial by jury was dealt with and rejected by this Court in *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969).

The trial judge's opinion, delivered following the trial, is unusually comprehensive and well reasoned and we adopt the following portion of it as the opinion of this Court.

> The defendant, J. D. Kitchens, is the father of Jimmy D. Kitchens, the latter having been indicted for murder by the grand jury of the Second Judicial District of Jones County, Mississippi, during the regular March 1973 Term of Court. The case of the State of Mississippi vs. Jimmy D. Kitchens, No. 4459, was scheduled for trial on Monday, April 16th, 1973, and prior to that date on motion of the defense counsel a special venire had been drawn to appear on Monday morning, April 16th, 1973. The venire, as I recall, contained names of 48 prospective jurors, among whom was one R. C. Nowell.
>
> On Saturday, April 14th, 1973, somewhere in the neighborhood of twelve-thirty, the defendant, J. D. Kitchens, approached the prospective juror, R. C. Nowell, at his home, and the Court after hearing the testimony of both Mr. Nowell, who was the State's only

witness, and the two witnesses for the defendant, J. D. Kitchens, who testified in his own behalf, and his wife, Mrs. J. D. Kitchens, the Court can find no other basis for a visit other than for the purpose of influencing a juror in this case. The testimony is somewhat hazy concerning whether or not the defendant knew at the time he visited the prospective juror whether he knew Nowell was at that time, or had at that time, already been summoned. The Court finds that he did know.

There is nothing revealed in the conversation that took place at their home to make the Court believe that it was for any other purpose than for one old friend to play on the human frailty of a friendship that had found its beginning in early childhood. I think it is of significance in this case that the defendant used that visit for the purpose of reminding this prospective juror of favors he had bestowed upon the juror's father years ago. The only real substance of that conversation was the fact that this defendant's son was in jail and that his trial was eminent.

R. C. Nowell is a person personally known to this Court, and he is a person in my opinion who is trustworthy and honest, although in this case it is apparent that he has been reluctant to implicate an old friend. The effect of that visit is vividly seen in what transpired immediately following the termination of that visit. This prospective juror being prodded by his conscience called the District Attorney and related to him that he had been approached and requested the District Attorney to excuse hem [sic] from the case. When this was developed on the voir dire examination on Monday morning, April 16th, 1973, the special venire, on motion of both the State and de-

fense counsel, was quashed and the Kitchens trial was continued for the term, and on the Court's own order this information presently pending before the Court was filed by the District and County Attorneys.

From the evidence the Court finds that the defendant, J. D. Kitchens, and the venireman, R. C. Nowell, reside about twenty miles apart, both being residents of Jones County, that years ago they were good friends and often attended the same church together, the venireman's father having been the pastor of the church where they attended. That during the period of time when they attended church together they were good friends and as is already indicated the defendant Kitchens befriended the pastor on at least one occasion, and these elements of friendship were rehashed again for what the Court thinks was a very apparent purpose on April 14th, 1973, when the defendant Kitchens contacted this prospective juror. It is also of significance that these parties had not visited together, and this is undisputed, ever in the home of the venireman, R. C. Nowell, until two days prior to the scheduled trial.

The fact that R. C. Nowell, who is in the Court's estimation, an honorable and trustworthy citizen of this County, felt constrained to report to the District Attorney that he had been contacted and to request that he be excused from the jury panel bespeaks loudly and clearly the embarrassing position in which this juror found himself. The purpose of the visit created subtle persuasion brought about by the defendant. The result of it is that the trial of one who is charge [sic] with one of the most serious crimes known in this nation has been delayed. The acts of the defendant were designed and calculated to ob-

struct, defeat, and impede justice and the administration thereof.

It doesn't matter that the defendant was tactful and subtle or that he skillfully and diplomatically engaged in euphemistic camouflage of purpose in making the visit, or in reminding this prospective juror of the past acts of friendship existing between himself and the venireman, and himself and the venireman's father.

The Court is not called upon in this case to refine the purpose of this visit to the point of being able to say beyond any doubt that it was for the purpose of creating a condition that would result in the State being required to exercise one of its peremptory challenges, or whether it was for some other equally illegal or unlawful purpose. The fact remains that it did in fact result in the delay of a trial and in the delay of justice.

Contemptuous acts for which one may be found guilty of obstructing the administration of justice are not limited to bribery of a juror or such other blatant indiscretions. Any act or conduct which tends to bring the authority of the Court and the administration of law into disrepute or which impedes the due administration of justice is subject to being punished as a contempt of court. Here, the act of the defendant of which complaint is nade, [sic] unquestionably was calulated [sic] and intended to play on human frality and proof that defendant's shots hit their mark is found in the fact that the venireman, though unlearned in law, felt compelled to report the incident to the District Attorney within a few minutes after defendant's visit was concluded. Any wilful attempt, of whatever nature, intended to influence jurors improperly in the

impartial discharge of their duties, whether by conversations or discussions, is contemptuous and it is wholly unnecessary that such attempt to influence the jurors should have succeeded. Here they did.

For these reasons, it will be the finding of the Court that the defendant, J. D. Kitchens, on April 14th, 1973, at the home of the venireman, R. C. Nowell, committed an act which the Court finds to be contemptuous, and it will be the sentence of the Court that the defendant be sentenced to serve a term of six months in the County Jail.

AFFIRMED.

RODGERS, P. J., and ROBERTSON, SUGG and BROOM JJ., CONCUR

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,869

MONDAY, APRIL 22, 1974 Court Sitting

J. D. KITCHENS

vs.

STATE OF MISSISSIPPI

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of the Second Judicial District of Jones County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 23rd day of April 1973 a conviction of CONSTRUCTIVE CONTEMPT and a sentence to serve a Term of SIX MONTHS in Jail—be and the same is hereby affirmed. It is further ordered and adjudged that the appellant and S. W. Orr and Mrs. J. D. Kitchens, sureties on the appeal bond herein do pay all of the costs of this appeal to be taxed for which let proper process issue.

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APPENDIX "C"

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

No. 9090

STATE OF MISSISSIPPI
Petitioner

vs.

J. D. KITCHENS
Respondent

FINDINGS OF FACT AND ORDER OF THE COURT

This cause this day came on to be heard by the Court on application or information filed by the District and County Attorneys, praying that the defendant, J. D. Kitchens, be cited for indirect contempt of Court, and the Court after hearing the evidence and being informed in the premises makes a finding of fact as follows:

The defendant, J. D. Kitchens, is the father of Jimmy D. Kitchens, the latter having been indicted for murder by the grand jury of the Second Judicial District of Jones County, Mississippi, during the regular March 1973 Term of Court. The case of the State of Mississippi vs. Jimmy D. Kitchens, No. 4459, was scheduled for trial on Monday, April 16th, 1973, and prior to that date on motion of the defense counsel a special venire had been drawn to appear on Monday morning, April 16th, 1973. The venire, as I recall, contained names of 48 prospective jurors, among whom was one R. C. Nowell.

On Saturday, April 14th, 1973, somewhere in the neighborhood of twelve-thirty, the defendant, J. D. Kitchens, approached the prospective juror, R. C. Nowell, at his home, and the Court after hearing the testimony of both Mr. Nowell, who was the State's only witness, and the two witnesses for the defendant, J. D. Kitchens, who testified in his own behalf, and his wife, Mrs. J. D. Kitchens, the Court can find no other basis for a visit other than for the purpose of influencing a juror in this case. The testimony is somewhat hazy concerning whether or not the defendant knew at the time he visited the prospective juror whether he knew Nowell was at that time, or had at that time, already been summoned. The Court finds that he did know.

There is nothing revealed in the conversation that took place at their home to make the Court believe that it was for any other purpose than for one old friend to play on the human frailty of a friendship that had found its beginning in early childhood. I think it is of significance in this case that the defendant used that visit for the purpose of reminding this prospective juror of favors he had bestowed upon the juror's father years ago. The only real substance of that conversation was the fact that this defendant's son was in jail and that his trial was eminent.

R. C. Nowell is a person personally known to this Court, and he is a person in my opinion who is trustworthy and honest, although in this case it is apparent that he has been reluctant to implicate an old friend. The effect of that visit is vividly seen in what transpired immediately following the termination of that visit. This prospective juror being prodded by his conscience called the District Attorney and related to him that he had been approached and requested the District Attorney to excuse

hem from the case. When this was developed on the voir dire examination on Monday morning, April 16th, 1973, the special venire, on motion of both the State and defense counsel, was quashed and the Kitchens trial was continued for the term, and on the Court's own order this information presently pending before the Court was filed by the District and County Attorneys.

From the evidence the Court finds that the defendant, J. D. Kitchens, and the venireman, R. C. Nowell, reside about twenty miles apart, both being residents of Jones County, that years ago they were good friends and often attended the same church together, the venireman's father having been the pastor of the church where they attended. That during the period of time when they attended church together they were good friends and as is already indicated the defendant Kitchens befriended the pastor on at least one occasion, and these elements of friendship were rehashed again for what the Court thinks was a very apparent purpose on April 14th, 1973, when the defendant Kitchens contacted this prospective juror. It is also of significance that these parties had not visited together, and this is undisputed, ever in the home of the venireman, R. C. Nowell, until two days prior to the scheduled trial.

The fact that R. C. Nowell, who is in the Court's estimation, an honorable and trustworthy citizen of this County, felt constrained to report to the District Attorney that he had been contacted and to request that he be excused from the jury panel bespeaks loudly and clearly the embarrassing position in which this juror found himself. The purpose of the visit created subtle persuasion brought about by the defendant. The result of it is that the trial of one who is charge with one of the most serious crimes known in this nation has been delayed. The acts of the

defendant were designed and calculated to obstruct, defeat, and impede justice and the administration thereof.

It doesn't matter that the defendant was tactful and subtle or that he skillfully and diplomatically engaged in euphemistic camouflage of purpose in making the visit, or in reminding this prospective juror of the past acts of friendship existing between himself and the venireman, and himself and the venireman's father.

The Court is not called upon in this case to refine the purpose of this visit to the point of being able to say beyond any doubt that it was for the purpose of creating a condition that would result in the State being required to exercise one of its peremptory challenges, or whether it was for some other equally illegal or unlawful purpose. The fact remains that it did in fact result in the delay of a trial and in the delay of justice.

Contemptuous acts for which one may be found guilty of obstructing the administration of justice are not limited to bribery of a juror or such other blatant indiscretion. Any act or conduct which tends to bring the authority of the Court and the administration of law into disrepute or which impedes the due administration of justice is subject to being punished as a contempt of court. Here, the act of the defendant of which complaint is nade, unquestionably was calulated and intended to play on human frailty and proof that defendant's shots hit their mark is found in the fact that the venireman, though unlearned in law, felt compelled to report the incident to the District Attorney within a few minutes after defendant's visit was concluded. Any wilful attempt, of whatever nature, intended to influence jurors improperly in the impartial discharge of their duties, whether by conversations or discussions, is contemptuous and it is wholly unnecessary

that such attempt to influence the jurors should have succeeded. Here they did.

For these reasons, it will be the finding of the Court that the defendant, J. D. Kitchens, on April 14th, 1973, at the home of the venireman, R. C. Nowell, committed an act which the Court finds to be contemptuous, and it will be the sentence of the Court that the defendant be sentenced to serve a term of six months in the County Jail.

SO ORDERED and ADJUDGED, this 24th day of April, 1973.

/s/ James D. Hester
Circuit Judge

FILED APRIL 25, 1973
DONICE V. KNIGHT, CIRCUIT CLERK
JONES COUNTY, MISSISSIPPI
MM
30/182-3

APPENDIX "D"

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,869

MONDAY, MAY 20, 1974 Court Sitting

J. D. KITCHENS

vs.

STATE OF MISSISSIPPI

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

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APPENDIX "E"

By Mr. Odom:

Call Mr. Nowell.

MR. R. C. NOWELL, CALLED AS A WITNESS FOR THE STATE, BEING FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP HIM GOD, TESTIFIED AS FOLLOWS:

Direct Examination

By Mr. Odom:

Q. State your name, please, sir?

A. R. C. Nowell.

Q. Mr. Nowell, I will ask you whether or not this past Monday week, yesterday week, you were summoned on a special venire in the case of State of Mississippi v. Jimmy D. Kitchens?

A. Yeah.

Q. All right, sir, and were you seated in the jury box and questioned by the Court and by the lawyers for both the defendant, or for—and for the State of Mississippi during the course of your jury service in that matter?

A. No, sir.

Q. Were you not seated in the jury box?

A. Yeah, I was seated.

Q. All right, and did not the Court talk to the whole jury preliminarily?

A. That's right.

Q. And did I not for the State of Mississippi talk to the jury for some length of time before the case was continued?

A. I believe so; yeah.

Q. And now after you were served with process to serve on that jury by the Deputy Sheriff, I will ask you if you saw Mr. J. D. Kitchens on a Saturday preceding that trial date set for Monday was a week ago?

A. Yeah.

Q. And that's Mr. J. D. Kitchens, defendant in this citation for contempt proceedings here?

By Mr. Buckley:

I object to the District Attorney leading the witness, if the Court please.

By the Court:

Overruled.

By Mr. Odom:

Q. Is that correct, Mr. Nowell?

By Mr. Buckley:

We object to the form of that question, if the Court please.

By the Court:

Overruled.

A. Yes, sir.

By Mr. Odom:

Q. Now, after you knew you were going to be a juror on that case, did Mr. J. D. Kitchens contact you and come to your house?

By Mr. Buckley:

I object for the same reason. The form of the question and it is leading and repetitious, also.

By the Court:

Overruled.

Go ahead and answer, Mr. Nowell.

A. Yeah, he come to my house.

By Mr. Odom:

Q. All right, sir, and when did he come to your house, Mr. Nowell?

A. Saturday.

Q. Saturday?

A. That's right.

Q. And that's on the Saturday before the Monday that you came up and were seated in the jury box?

A. Right.

By Mr. Buckley:

I object to the form of the question again, if the Court please.

By the Court:

Overruled.

By Mr. Odom:

Q. Is that correct?

A. Yeah.

Q. Why did he come to your house?

A. Well, he didn't—the only thing he said to me, and he didn't ask me no favors whatsoever, he asked me did I have a summons, or something like that, and I told him

Q. You told him you were on the jury?

A. Yeah. I told him I had a summons, or whatever, and he said, "Well, my boy is up for trial." I don't believe he stated what for or nothing like that, but I had read it in the paper and that's all I know. And that's about all. He didn't ask me for no favors whatsoever.

Q. Yes, sir, I understand that, but he asked you if you were served for the jury and would be on the jury, ddn't he?

A. Yeah.

By Mr. Buckley:

I object to the form of the question, if the Court please. Again it is leading.

By the Court:

Overruled.

By Mr. Odom:

Q. All right, and he told you that his boy was to be tried, didn't he?

By Mr. Buckley:

We object - - -

Q. —Jimmy Kitchens?

A. Yeah.

By Mr. Buckley:

—we object again to the form of the question, if the Court please. Your Honor, I don't think the witness understands I have a right to make my objections before he answers.

By the Court:

Mr. Nowell, when an objection is made don't answer until I rule, and if I overrule it you can answer and if I sustain it you don't.

A. Okay.

By the Court:

Overruled.

By Mr. Odom:

Q. All right, and what else did he say to you about your jury service?

By Mr. Buckley:

I object to the form of that question also, if the Court please. He is leading the witness again.

By the Court:

Overruled.

By Mr. Odom:

Q. Did he say anything else to you about your jury service?

A. I don't think so.

Q. Did he say anything else to you about his boy?

A. No, I don't think so.

Q. All right, sir, and what else did he have to say to you while he was there?

A. Well, he—we talked a little bit about long ago when we were young. He didn't stay too long.

Q. And had you ever known him before?

A. Oh, J. D.?

Q. Yeah.

A. Yes, sir.

Q. And how had you known him?

A. We were raised not too far apart.

Q. How far apart?

A. Four or five miles. I wouldn't say exactly.

Q. All right, as boys you were raised up together?

A. That's right.

Q. And how far do you now live from him, or did you live from him at the time he contacted you on this Saturday before the trial of his son on the following Monday morning?

A. I would say it was around twenty miles, or maybe not that far.

Q. All right, and how long had it been since you had visited in his home?

A. I hadn't never visited in his home.

Q. And how long had it been since he had visited in your home?

A. I don't recall—I don't think so.

Q. And he had never visited in your home, had he?

By Mr. Buckley:

We object to the District Attorney leading the witness again.

By the Court:

Sustain the objection.

By Mr. Odom:

Q. Did he not tell you—he asked you if you were going to serve on the jury; is that correct?

A. Yeah - - -

By Mr. Buckley:

—to which we object again, if the Court please. It is repetitious and also leading the witness.

By the Court:

Overruled.

By Mr. Odom:

Q. And you talked with Robert Sullivan and myself here last Monday on the day this case came on for trial, in the side room here, didn't you?

A. Yes, sir.

Q. All right, and did he say anything about that his boy had been in a good deal of trouble but to make it as light on him as you possibly could?

By Mr. Buckley:

If it please the Court - - -

A. —no, sir.

By Mr. Buckley:

- - - object to the District Attorney leading the witness and trying to get in directly or indirectly his own conversation and that of the County Attorney too with the witness, and trying to cross examine his own witness.

By the Court:

Sustained.

By Mr. Odom:

Q. In other words, you tell the Court that he came to renew your old friendship of you all having been raised together years ago?

By Mr. Buckley:

I object to that, if the Court please. That's not what he said. The District Attorney is asking the witness to conclude something that's not fair to be drawn or concluded from the evidence, and he is cross-examining his witness.

By the Court:

Overruled.

By Mr. Odom:

Q. What time of the day did he come to your house?

A. It was after dinner and that's all I know. I wouldn't say the - - -

Q. —after dinner?

A. Yes, sir.

Q. And who was there at your home at the time he came?

A. I was there by myself.

Q. By yourself?

A. That's right.

Q. All right, and how long did he stay there with you?

A. Well, that would be hard to say.

Q. Was it thirty minutes or an hour?

A. Something like that—twenty or twenty-five.

Q. And what did he say when he first got to your house?

A. I believe he said he wanted to see me, or talk with me, or something. I don't remember just the words he said.

Q. Refresh your memory and see if you can recall back now what the first words he said when he got there were?

A. Well, I believe I was in the bed when he got there, and I got up. I heard the car horn and I got up and went to the door and he got out and I believe he said he wanted to see me.

Q. All right, and what did he tell you he wanted to see you about?

A. That's all he said. I told him to let me go back and put my shoes on; I had my shoes off.

Q. All right.

A. And I come on out there and he asked me then did I have a summons, or was summoned on the jury, or

something, and I told him yeah, and he said, "Well, you know my boy is gonna be tried." And that's about the words he told me.

Q. And anything else?

A. No.

Q. Now the—it didn't take him long to say that, did it?

By Mr. Buckley:

We object to that, if the Court please.

A. We set there and talked a while before he mentioned that.

By Mr. Buckley:

Just a minute, Mr. Nowell.

A. He didn't jump right out and - - -

By Mr. Buckley:

Let the Court rule on it.

By the Court:

Overrule the objection.

By Mr. Odom:

Q. What else did you all talk about?

A. That was about it. Just things when we were young.

Q. What things when you were young?

A. Talking about our work, and about my Daddy going to church and preaching down there, and him going and taking a raincoat to him one Sunday when it was raining.

Q. And what was his conversation? Of old acquaintance and friendship?

A. Yeah, I reckon.

Q. And were ya'll very close together when you were raised up?

A. Well, about every Sunday, I reckon, or probably every other Sunday, or something like that. My Daddy was pastor of the church down there where his folks belonged.

Q. Yes, sir, and you lived next door neighbors in the country at that time?

A. Well, it was three or four miles.

Q. Did folks live close together then like they do now?

A. No, sir.

Q. In fact, you were close neighbors there in the community?

A. Yeah.

Q. All right, did he say anything to you at all about the kind of boy that he had—his boy?

By Mr. Buckley:

If it please the Court, he is continuing to lead the witness again and suggesting answers.

By the Court:

Overruled.

By Mr. Odom:

Q. Did he say anything to you about the kind of boy he had?

A. Yeah, he said he was a bad boy.

Q. Did he—

A. —I believe that's what he said.

Q. Did he say anything else about the boy?

By Mr. Buckley:

We object, if the Court please, and ask that the response be stricken now. The witness has qualified his answer which is not tantamount to a sworn statement at all.

By the Court:

I didn't hear his answer.

By Mr. Buckley:

Would the Court Reporter read it back, if you understood it?

(WHEREUPON THE REPORTER READ ALOUD FROM THE RECORD.)

By the Court:

Sustain the objection.

By Mr. Odom:

Q. Did he say anything else to you about his boy?

A. No, sir, not about the boy. No, sir.

Q. Did you know why he told you that he was a bad boy?

A. Well, no more than what I had read. I don't even know the man.

Q. Did he say anything else to you about the boy?

A. No, sir.

Q. And you all talked for you said about twenty-five minutes?

A. Twenty or twenty-five, or maybe thirty. I don't know exactly.

Q. Did he ask you to reach any certain results in the case?

A. No, sir. No, sir.

Q. And I believe then you called me, didn't you, Mr. Nowell?

A. Yeah.

Q. And asked me to excuse you off the jury?

A. Right.

Q. Why did you do that, Mr. Nowell?

By Mr. Buckley:

To which we would object, if the Court please.

By the Court:

Overruled.

By Mr. Buckley:

May I assign my reason, your Honor? That's asking the witness for a conclusion and is not relevant to the issue presented here.

By the Court:

Overruled.

By Mr. Odom:

Q. Why did you do that, Mr. Nowell?

A. Well, I got to studying about it and I just didn't want to sit on it.

Q. Why didn't you want to sit on it?

A. Well, I was afraid—I have these smothering spells, and I had to retire.

Q. Sir?

A. I had to retire young.

Q. Yes, sir.

A. And I have smothering spells.

Q. Yes, sir.

A. And that's one thing it was.

Q. All right, sir, and was there another thing that caused you to call me?

A. Well, I didn't want to - - -

By Mr. Buckley:

—if the Court please, again I think whether or not this man called him and his reasons have no bearing in this case.

By the Court:

Overruled.

By Mr. Odom:

Q. Would you answer my question, Mr. Nowell?

A. What did you want to know?

Q. Was there another reason why you called me, Mr. Nowell?

A. Yeah, I just tell you, I got to studying about it and that's the reason I called you.

Q. Well, what did you get to studying about, Mr. Nowell?

A. Well, they said they would get me if I didn't report it, and that's all I know.

Q. They would get you if you didn't what?

A. Report it to you or the Judge.

Q. Who said they would get you?

A. A fellow that lives out there at the house, after he found out Mr. Kitchens and them had come there and mentioned, and he said, "The best thing you can do is notify Mr. Odom or the Judge."

By Mr. Buckley:

If the Court please, I object to this. For this type proceeding, I don't see that it is relevant.

By the Court:

Overruled.

By Mr. Odom:

Q. Did you talk with someone else about Mr. Kitchens coming to your house before you called me?

A. No, he just asked me who was the guy.

Q. Who was what?

A. Who was the guy that left the yard.

Q. Yes, sir, and - - -

By Mr. Buckley:

—we object on the basis of hearsay too, if the Court please.

By Mr. Odom:

I am not asking what was said, Judge.

By the Court:

Overruled.

By Mr. Odom:

Q. That who would get you if you didn't report it?

A. He said the Court would. I was supposed to report it, and I don't know whether I was or not.

Q. Yes, sir. Did you feel like you ought to report it?

By Mr. Buckley.

We object to that, if it please the Court.

A. That's why I called you.

By the Court:

Overruled.

By Mr. Odom:

Q. And that's why you called me?

A. Right.

By Mr. Buckley:

We object to the form of the question.

By the Court:

Overruled.

By Mr. Odom:

Q. Why did you feel like you ought to report it—you, yourself, Mr. Nowell, ought to report it?

A. Well, this guy told me I should do it.

Q. I know, but did you feel like you ought to report it even before you talked to this other guy?

By Mr. Buckley:

If the Court please, we object—

A. —no, I wouldn't - - -

By Mr. Buckley:

—pardon me and let me object. I object to the District Attorney cross-examining his witness.

By the Court:

Overruled.

By Mr. Odom:

Q. Well, you asked me, Mr. Nowell, to excuse you, that you could not sit on the jury, didn't you?

A. Yes—

By Mr. Buckley:

—I object to that, to the form of the question.

By the Court:

Overruled.

By Mr. Odom:

Q. Why did you tell me that you couldn't sit on the jury?

By Mr. Buckley:

I object, if it may please the Court again, to leading the witness.

By the Court:

State your reason.

By Mr. Buckley:

I object to leading.

By the Court:

Overruled.

By Mr. Odom:

Q. Why did you tell me you couldn't sit on the jury?

A. Well, I was raised with Mr. Kitchens, and I didn't feel like maybe—me and him being raised together, and I didn't want to sit on the jury on account of it was his son, you know.

Q. Yes, sir.

A. But he didn't ask me for no favors whatsoever.

Q. Yes, sir, I understand, but that was what he came to see you about, wasn't it?

A. Well, in my mind I believe it was.

By Mr. Buckley:

We object to that, if the Court please, and ask his response be stricken. It is qualified and takes it outside the realm of a sworn statement.

By the Court:

Overruled.

By Mr. Odom:

Q. That's what he came to see you about, wasn't it?

By Mr. Buckley:

We object to the form of the question.

By the Court:

Sustained. It is repetitious.

By Mr. Odom:

Q. That's what he talked to you about, wasn't it?

By Mr. Buckley:

We object, because it is repetitious.

Q. You nodded, indicating yes?

A. Yes.

By Mr. Buckley:

—and the form of the question. The District Attorney is leading if the Court please.

By the Court:

Overruled.

By Mr. Odom:

Q. All right, sir, and where did you live at the time Mr. Kitchens contacted you last Saturday was a week ago, Mr. Nowell?

A. Out here on Highway 84 East.

Q. On 84 East?

A. Yes, sir.

Q. And did you own land at that time? A home?

A. Last Saturday?

Q. Yes, sir.

A. Yes, sir.

Q. Saturday a week ago, when Mr. Kitchens came to your house?

A. Yes, sir.

Q. All right, sir, and do you pay taxes on that land?

A. Yes, sir.

Q. And would you tell me what courthouse you pay your taxes on that land at?

A. Right here.

Q. Right here in Laurel, Mississippi?

A. That's right.

By Mr. Odom:

That's all.

APPENDIX "F"

By the Court:

All right, gentlemen, this is not an adversary proceeding.

By Mr. Odom:

Yes, sir. Not knowing what the juror may or may not say, could I suggest that the Court clear the courtroom while taking his—or invoke the rule, or whatever it is the Court - - - (breaking off)

By the Court:

For the purpose of this examination, I don't think that's necessary.

By the Court:

Q. All right, Mr. Nowell, who was it that you said talked to you last Saturday?

By Juror (Mr. R. C. Nowell)

A. That was Mr. Kitchens.

Q. Which Mr. Kitchens is that?

A. J. D. Kitchens.

Q. The defendant in this case?

A. No, that's not him.

Q. That's not the one that talked to you?

A. No, sir.

Q. Do you know what relation he is to this defendant?

A. All I know it is his father.

Q. It is his father?

A. Yes, sir.

Q. All right, did he mention to you this case was coming up for trial this week?

A. No, I don't think so.

Q. What did he say?

A. He said his son was on trial—to be on trial or something like that.

Q. What did—did he ask you to do anything in relation to it?

A. No, sir.

Q. To reach no particular decision in it?

A. No, sir.

Q. I believe you have stated to the District Attorney that you had called the District Attorney last Saturday?

A. Yeah, I wanted—I didn't want to be on the jury.

Q. Was it because he—

A. —no, me and Mr. Kitchens was raised together; three or four miles apart, I guess.

Q. And he didn't—what did you say to Mr. Odom then? Tell us that so we can get it all in the record.

A. Well, I just wanted to be excused from the jury, and he told me I would have to come up here this morning. Because me and Mr. Kitchens was raised up together.

Q. Did you report to him that you had been approached by the defendant's father?

A. I may have told him something or other about it. I don't know. There wasn't any—it wasn't no more than he just said his son would be on trial, or something like that.

Q. Did he ask you if you were a juror?

A. I don't think so.

Q. Did you tell him you were a juror?

A. I told him I had a summons.

Q. Was this before he talked to you about the case?

A. I believe it was.

Q. Did he tell you how the killing occurred?

A. No, sir.

Q. Did he tell you anything about the guilt or innocence of his son?

A. No, sir.

Q. Are you wanting to be excused because you have been talked to by him?

A. No, sir. I was just raised with Mr. Kitchens and I figured it wasn't right for me to sit on the jury.

Q. What time did he come to see you?

A. I wouldn't say what time it was.

Q. Was it in the daytime Saturday, or—

A. —oh, yeah, it was daytime.

Q. All right.

A. And it was after twelve, but I don't—I wouldn't say what time it was.

Q. Mr. Nowell, did you understand my question when I first asked it a moment ago if anyone had talked to you about this case? When I first started out on the examination of the jury did you understand that?

A. No, sir.

Q. Did you understand my question when I asked if there was anyone on this jury panel who had reported they had been talked to? Did you understand that question?

A. No, I didn't.

Q. Let me ask it again. Have you been talked to about this case?

A. No, not being no way no more than he just said his son was supposed to be tried, and that's all.

Q. Was anyone with him when he came to see you?

A. His wife was with him.

Q. Anyone else?

A. No.

Q. Just the two of them?

A. Yes.

Q. Did they get out and come in your home?

A. No, we set out on the carport.

Q. Do you know what time it was that you called the District Attorney and had this conversation with him?

A. No, I wouldn't say what time it was.

Q. How long had it been since you had seen Mr. J. D. Kitchens before Saturday?

A. Well, I imagine it hadn't been too long.

Q. Do you know where he lives now?

A Yes, sir.

Q. How far does he live from your home?

A. About ten or twelve miles.

Q. How long has it been since the last time he and his wife came to your home before Saturday?

A. I wouldn't say.

Q. Has it been months or years?

A. It's been a year, I imagine, or years. I wouldn't say how many. We did go to church together when we were boys at Tiger Creek Church.

Q. Do you think he was trying to influence you in this case?

A. No, sir, I don't.

Q. You do not. Do you recall why you told the District Attorney you wanted to be excused from jury duty?

A. Yes.

Q. What did you tell him?

A. Well, I knew Kitchens all my life, you might say.

Q. And this is what you told Mr. Odom?

A. Yeah, I think so.

Q. Did you give him any other excuse?

A. No, I don't think so.

Q. Did Mr. Odom talk to you about this case in any way?

A. I don't believe he did.

Q. Did Mr. Odom ask you to report this to the Court?

A. I believe he said I should do it, or something like that.

By the Court:

Mr. Odom, I will permit you to state into the record your recollection of anything that occurred concerning that transaction, or this statement.

By Mr. Odom:

If the Court please, a person identifying himself as being Mr. Nowell called me somewhere I would say between three-thirty and four o'clock Saturday afternoon, and I believe asked me what I was doing and I told him cleaning up the yard and working, and I had to sort of work on the weekends for a living around the house, and he said that he needed to see me, and I asked him if he knew where I lived and he said that he didn't and I tried to tell him where I lived, about three-quarters mile off the highway east of Laurel, and I believe that we had some words about where I lived and he twice told me he didn't know where I lived. I thought at that time by then that his voice sounded familiar and I knew who I was talking to but I know now that I didn't. He told me that he lived about ten miles and he needed to see me before Monday morning, and I believe, and I am practically sure I asked him what about, and he said, "They have come to see me and you will have to excuse me off of that jury Monday" I told Mr. Nowell, or the person that identified himself as being Nowell, that he had to report that to the Circuit Court, and repeated again—he repeated again he wanted to be excused off the jury Monday. At that time I didn't know who was on the jury at all. I then attempted to call your Honor and your Honor was out of town and I got in contact with your Honor yesterday morning, and told Your Honor, as I perceived my duty to be, even at that time not knowing whether any Nowell was on the jury or not, and I feel now in view of Mr. Nowell being here that Mr. Nowell honestly was trying to report that someone had talked with him in reference to this case and his jury duty, and I feel that he felt that he reported it to me and I reported it to your Honor. I don't feel like he deliberately did anything wrong, or thought he was doing anything wrong, in failing to respond to the Court's questions this

morning on voir dire, or to mine, because when I asked him if he called me Saturday afternoon he promptly answered, "Yes." I don't feel of his own motion that he has tried to do anything wrong, in reference to this situation. Now, there may be more to it than what he is telling, but I think he was honest about reporting it.

By the Court:

Q. All right, Mr. Nowell, is there anything that the District Attorney has said that you don't remember transpiring like he said it did?

A. No, I don't think so.

Q. All of it as far as you—

A. —I think he is pretty true about that.

Q. All right.

By the Court:

I am going to direct the District Attorney and the County Attorney to initiate contempt of court proceedings against J. D. Kitchens. You can file your petition and I will issue the Fiat on it, as soon as you have an opportunity.

By Mr. Buckley:

Defendant has a motion to make, if the Court please.

By the Court:

All right.

By Mr. Buckley:

The defendant moves that the regular and the special venire be quashed and be discharged and that a mistrial be declared in this cause for the reason that on the voir dire examination of the juror, or venireman, R. C. Nowell, in the presence of the rest of the special and regular venire, it was obvious in open Court that the juror Nowell was referring to a conversation between himself and someone by the name of Kitchens, the same name of the defendant, and this is a proceedings that took place in the presence of the jury and was calculated to or did—pardon me, not calculated to, but did in all probability lead the jury to

believe that some Mr. Kitchens had talked to a member of the panel in an attempt to or an intent to sway the opinion in this cause, and the defendant believes that would unduly prejudice the whole jury and taint them, and would disqualify them from being fair and impartial jurors, and deny this defendant a fair and impartial trial in this case.

By Mr. Odom:

If the Court please, before you rule could we have a conference between counsel and the Court in your chambers?

By the Court:

Yes, sir.

* * * (Conference in Chambers.)

By the Court:

Mr. Nowell, I want to thank you for giving this information to the Court and I think it is commendable that you have revealed the whole thing as you recall it, and the Court wants to thank you for it. Mr. Nowell, if anyone contacts you hereafter as a result of what you have said in Court, called me immediately. Would you do that?

A. Yes, sir.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-139

J. D. KITCHENS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of Supreme Court of Mississippi is reported as *Kitchens* v. *State*, 293 So.2d 815 (Miss. 1974). Rehearing was denied on May 20, 1974. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ Of Certiorari through the authority of 28 U.S.C., Section 1257(3). Jurisdiction is properly invoked by virtue of the Sixth Amendment question presented in regard to the right to a trial by jury for the crime of constructive contempt of court.

QUESTIONS PRESENTED

(1) Whether the due process rights of petitioner under the Fourteenth Amendment were violated in regard to the information charging petitioner with the crime of constructive contempt of court?

(2) Whether the evidence presented justified the findings of the trier of fact?

(3) Whether petitioner, charged with constructive contempt of court, was entitled to a trial by jury under the Sixth Amendment?

STATEMENT OF THE CASE

Mr. R. C. Nowell was summoned for jury duty on a special venire drawn for the case of State of Mississippi v. Jimmy D. Kitchens which was scheduled for trial on April 16, 1973. Two days before the trial date, petitioner, father of Jimmy D. Kitchens, visited Mr. Nowell at his home. It had been many years since petitioner had visited the home of Mr. Nowell. During the visit, petitioner asked

Mr. Nowell if he had been summoned for jury duty, and Mr. Nowell replied that he had a summons. Then, petitioner remarked, "Well, my boy is up for trial." Petitioner did not say anything more about the jury duty and his son's trial. He did not directly ask Mr. Nowell for any favors in regard to his son's trial. However, the conversation proceeded into a discussion of their friendship during their youth, and the fact that petitioner had befriended Mr. Nowell's father on one occasion.

Mr. Nowell later indicated to the trial court on voir dire examination that he wanted to be excused from jury duty because he and petitioner had been raised together and now, petitioner's son was going to be tried. As a result, the trial court sustained the defendant's motion to quash the jury panel.

Petitioner was charged in the Circuit Court of Jones County, Mississippi, with constructive contempt of that court. Petitioner was tried and adjudged guilty of the offense and sentenced to serve a term of six (6) months in the Jones County Jail.

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that his due process rights were violated by the vague and indefinite charge contained in the information.

The issue in regard to the sufficiency of the evidence is not properly before this Court.

Further, the opinion of the Mississippi Supreme Court as to petitioner's right to a trial by jury is not at variance with the applicable decisions of this Court.

ARGUMENT

Petitioner would urge that the information is vague and indefinite and does not affirmatively charge that he committed any act whatsoever. Respondent submits that petitioner's contention is without merit. A review of the information (Petitioner's Brief, pp. 8-9) demonstrates that paragraphs II and III set out specifically the facts alleged to constitute the offense and meet the essential requirements of such pleadings. SEE: *Jordan* v. *State*, 216 Miss. 542, 62 So.2d 886 (1953).

Further, it has been decided by this Court that an assertion of a violation of a constitutional right to be specifically informed of the nature of the offense charged does not raise a Federal question of sufficient merit to sustain a writ of error from this Court. *Barrington* v. *Missouri*, 205 U.S. 483, 51 L.Ed. 890, 27 S.Ct. 582 (1907); *Caldwell* v. *Texas*, 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 (1891).

Respondent submits that petitioner's second contention, that the evidence was insufficient to support the findings of the trier of fact is not properly before this Court. It is well established that this Court has no jurisdiction to review a decision of a state court, affirmed by the highest court of the state, which was based upon a pure question of fact. *Dower* v. *Richards*, 151 U.S. 658, 38 L.Ed. 305, 14 S.Ct. 452 (1894).

For the purposes of deciding whether or not a defendant is entitled to a trial by jury in a contempt case, this Court has considered whether the contempt is a petty or serious offense and has held that the punishment imposed is the determinative factor. *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968). Further,

this Court has decided that crimes punishable by a maximum of six months imprisonment are petty and do not require a jury trial. *Baldwin* v. *New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970).

In the case of *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969), the Mississippi Supreme Court adopted the reasoning of *Bloom, supra*, and held:

> . . . where the confinement is not more than six months and the fine not more than $500, that the offense is a petty one and the accused is not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States. (222 So.2d 690 at 692)

Thus, the opinion of the Mississippi Supreme Court as to petitioner's right to a trial by jury is not at variance with the applicable decisions of this Court.

CONCLUSION

Respondent respectfully submits that there has been no violation of petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER, Attorney General
By: KAREN GILFOY
Special Assistant Attorney General
PETE J. CAJOLEAS
Special Assistant Attorney General
Of Counsel

CERTIFICATE

I, Pete J. Cajoleas, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Mr. L. Percy Quinn, Attorney at Law, P. O. Box 1085, Laurel, Mississippi 39440.

This the 18th day of November, 1974.

PETE J. CAJOLEAS
Special Assistant Attorney General

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,869

J. D. KITCHENS

v.

STATE OF MISSISSIPPI

SMITH, JUSTICE:

J. D. Kitchens was charged in the Circuit Court of Jones County with constructive contempt of that court. Following trial, he was adjudged guilty of that offense and sentenced to serve a term of six months in the county jail. He appeals from that judgment and sentence.

A number of matters are assigned as having constituted reversible error.

First, it is argued that the jurisdiction of the trial court to try the case was not established. This contention is without merit. In *Prine* v. *State*, 143 Miss. 231, 242, 108 So. 716, 719 (1926), it was stated:

> No other court [except the court against which the contempt was committed] has any authority to punish such a contempt. Statutes regulating the venue of trials of criminal offenses generally are inapplicable to contempt proceedings.

At page 126, 17 C.J.S. *Contempt*, section 51 (1963), the rule is given as follows:

> It is a well established rule that the power to judge a contempt rests exclusively with the court contemned, and that no court is authorized to punish a contempt against another court.

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To the same effect, *see also* 17 C.J.S. *Contempt*, section 64, page 167 (1963).

We have examined and considered the other alleged errors assigned and have concluded from the record that appellant was fairly tried and that the evidence was sufficient to support the trial judge's findings.

The contention that appellant was entitled to trial by jury was dealt with and rejected by this Court in *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969).

The trial judge's opinion, delivered following the trial, is unusually comprehensive and well reasoned and we adopt the following portion of it as the opinion of this Court.

> The defendant, J. D. Kitchens, is the father of Jimmy D. Kitchens, the latter having been indicted for murder by the grand jury of the Second Judicial District of Jones County, Mississippi, during the regular March 1973 Term of Court. The case of the State of Mississippi vs. Jimmy D. Kitchens, No. 4459, was scheduled for trial on Monday, April 16th, 1973, and prior to that date on motion of the defense counsel a special venire had been drawn to appear on Monday morning, April 16th, 1973. The venire, as I recall, contained names of 48 prospective jurors, among whom was one R. C. Nowell.
>
> On Saturday, April 14th, 1973, somewhere in the neighborhood of twelve-thirty, the defendant, J. D. Kitchens, approached the prospective juror, R. C. Nowell, at his home, and the Court after hearing the testimony of both Mr. Nowell, who was the State's only witness, and the two witnesses for the defendant, J. D. Kitchens, who testified in his own behalf, and his wife, Mrs. J. D. Kitchens, the Court can find no

other basis for a visit other than for the purpose of influencing a juror in this case. The testimony is somewhat hazy concerning whether or not the defendant knew at the time he visited the prospective juror whether he knew Nowell was at that time, or had at that time, already been summoned. The Court finds that he did know.

There is nothing revealed in the conversation that took place at their home to make the Court believe that it was for any other purpose than for one old friend to play on the human frailty of a friendship that had found its beginning in early childhood. I think it is of significance in this case that the defendant used that visit for the purpose of reminding this prospective juror of favors he had bestowed upon the juror's father years ago. The only real substance of that conversation was the fact that this defendant's son was in jail and that his trial was eminent.

R. C. Nowell is a person personally known to this Court, and he is a person in my opinion who is trustworthy and honest, although in this case it is apparent that he has been reluctant to implicate an old friend. The effect of that visit is vividly seen in what transpired immediately following the termination of that visit. This prospective juror being prodded by his conscience called the District Attorney and related to him that he had been approached and requested the District Attorney to excuse hem [sic] from the case. When this was developed on the voir dire examination on Monday morning, April 16th, 1973, the special venire, on motion of both the State and defense counsel, was quashed and the Kitchens trial was continued for the term, and on the Court's own order this information presently pending before the Court was filed by the District and County Attorneys.

From the evidence the Court finds that the defendant, J. D. Kitchens, and the venireman, R. C. Nowell, reside about twenty miles apart, both being residents of Jones County, that years ago they were good friends and often attended the same church together, the venireman's father having been the pastor of the church where they attended. That during the period of time when they attended church together they were good friends, and as is already indicated the defendant Kitchens befriended the pastor on at least one occasion, and these elements of friendship were rehashed again for what the Court thinks was a very apparent purpose on April 14th, 1973, when the defendant Kitchens contacted this prospective juror. It is also of significance that these parties had not visited together, and this is undisputed, ever in the home of the venireman, R. C. Nowell, until two days prior to the scheduled trial.

The fact that R. C. Nowell, who is in the Court's estimation, an honorable and trustworthy citizen of this County, felt constrained to report to the District Attorney that he had been contacted and to request that he be excused from the jury panel bespeaks loudly and clearly the embarrassing position in which this juror found himself. The purpose of the visit created subtle persuasion brought about by the defendant. The result of it is that the trial of one who is charge [sic] with one of the most serious crimes known in this nation has been delayed. The acts of the defendant were designed and calculated to obstruct, defeat, and impede justice and the administration thereof.

It doesn't matter that the defendant was tactful and subtle or that he skillfully and diplomatically engaged in euphemistic camouflage of purpose in mak-

ing the visit, or in reminding this prospective juror of the past acts of friendship existing between himself and the venireman, and himself and the venireman's father.

The Court is not called upon in this case to refine the purpose of this visit to the point of being able to say beyond any doubt that it was for the purpose of creating a condition that would result in the State being required to exercise one of its peremptory challenges, or whether it was for some other equally illegal or unlawful purpose. The fact remains that it did in fact result in the delay of a trial and in the delay of justice.

Contemptuous acts for which one may be found guilty of obstructing the administration of justice are not limited to bribery of a juror or such other blatant indiscretions. Any act or conduct which tends to bring the authority of the Court and the administration of law into disrepute or which impedes the due administration of justice is subject to being punished as a contempt of court. Here, the act of the defendant of which complaint is nade, [sic] unquestionably was calulated [sic] and intended to play on human frailty and proof that defendant's shots hit their mark is found in the fact that the venireman, though unlearned in law, felt compelled to report the incident to the District Attorney within a few minutes after defendant's visit was concluded. Any wilful attempt, of whatever nature, intended to influence jurors improperly in the impartial discharge of their duties, whether by conversations or discussions, is contemptuous and it is wholly unnecessary that such attempt to influence the jurors should have succeeded. Here they did.

For these reasons, it will be the finding of the Court that the defendant, J. D. Kitchens, on April 14th, 1973, at the home of the venireman, R. C. Nowell, committed an act which the Court finds to be contemptuous, and it will be the sentence of the Court that the defendant be sentenced to serve a term of six months in the County Jail.

AFFIRMED.

RODGERS, P. J., and ROBERTSON, SUGG and BROOM JJ., CONCUR.